

JAN 8 1990

JOSEPH F. SPANIEL, JR.
CLERK

No. 89-952

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1989

UNITED STATES STEEL CORPORATION PLAN
FOR EMPLOYEE INSURANCE BENEFITS; USX
CORPORATION, as plan sponsor; UNITED
STATES STEEL AND CARNEGIE PENSION FUND,
plan administrator; and UNITED STATES
STEEL INSURANCE BENEFIT TRUST FUND,
Petitioners,

v.

GLENN MUSISKO AND ALL OTHERS SIMILARLY
SITUATED to Glenn Musisko, and THE
HONORABLE SILVESTRI SILVESTRI in his
official capacity as Judge of the Court
of Common Pleas of Allegheny County,
Pennsylvania,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS
MUSISKO AND CLASS

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COUNTERSTATEMENT OF THE CASE

On July 25, 1982, Glenn Musisko, a U.S. Steel Employee, was severely injured in a non-work related automobile accident. At the time, he was covered under a Program of Insurance Benefits issued by Equitable Life Assurance Society, (hereafter Equitable) to U.S. Steel employees (Ex. "T", App. 113a).

Under the Equitable Insurance policy in question at page 102 and at page 3 of the FOREWORD, Respondent Musisko was permitted to file an action at law to recover benefits alleged to be due under the policy (App. 116a, 124a).

Equitable denied Respondent Musisko's claim by letter written to Musisko on September 27, 1982, a copy of

The first part of the paper discusses the importance of the study and the objectives of the research. It then proceeds to a detailed description of the methodology used, including the selection of participants and the procedures followed. The results of the study are presented in the following section, followed by a discussion of the findings and their implications. The paper concludes with a summary of the main points and a list of references.

which was sent to U.S. Steel management representative, Bob Yost (Ex. "B", App. 46a, Ex. "P", App. 109a).

As a result of the denial by Equitable, of Respondent's claim for benefits under his policy, Musisko filed suit against Equitable in the Court of Common Pleas of Allegheny County, Pennsylvania (hereafter State Court) on October 28, 1982 (Ex. "A", App. 40a). Thereafter, on June 22, 1983, the case proceeded to trial on the merits, wherein a U.S. Steel management employee, one Joseph Jenkins, testified as an expert witness on behalf of Equitable (Ex. "S", App. 112a, 137a). After an award for Musisko, summary judgment was granted in favor of Equitable and on appeal to the Pennsylvania Superior Court, the case



was remanded for ... "entry of judgment in favor of appellant, Glen J. Musisko." Musisko v. Equitable Life Assurance Society, 344 Pa. Super. 101, 496 A.2d 28, at 31, (1985) (App. 47a). The Superior Court of Pennsylvania held that section 9.37 of the PIB group policy at issue, did not preclude Musisko's claim for wage loss under the policy in question, as long as same did not exceed the total amount of actual wage loss sustained by Musisko including the amount of payments made under his automobile insurance policy. The Court concluded that the section in dispute was ... "susceptible to another reasonable interpretation." Musisko, Id. at 31. The case was appealed to the Pennsylvania Supreme Court on the issue



of Equitable's liability under the policy, and allocatur was denied (Ex. "D", App. 51a).

After extensive discovery following remand to the State Trial Court, the case was certified as a class action on January 8, 1987 and approximately 225 U.S. Steel employees opted into the class (Ex. "I" and "J", App. 60a, 69a). After the close of discovery, on or about September 1, 1987, Equitable was forwarded a list of all class members entitled to receive benefits, along with the amounts to which they were entitled, including interest at 6% simple.

Throughout the tortured procedural and substantive history of the State Court action (see Ex. "A" of



Musisko's Motion To Dismiss U.S.X.'s Complaint against Respondent Musisko and Class filed in the United States District Court on November 17, 1987 (App. 29a and Ex. "A" App. 40a), through the date of November 10, 1987 (the date of Petitioners' Federal suit), the State Court action proceeded through a trial on the merits which resulted in an award for Musisko, one set of preliminary objections filed by Equitable and dismissed, four Motions for Summary Judgment, two appeals to the Pennsylvania Superior Court, one Petition for Allowance of Appeal to the Pennsylvania Supreme Court on the issue of Equitable's liability which was denied, a certification hearing on the class action aspects of the case and exten-



sive discovery from which approximately 225 class members opted into the class, which proceedings covered a period of over five years (Ex. "A", App. 40a).

During the above five year period in which discovery was supervised by U.S. Steel Corporation representatives including their attorney and supervisory personnel in different parts of the State of Pennsylvania, not once did Equitable petition to remove the State Court action to Federal Court, attempt to join Federal Plaintiffs (Petitioners herein) as additional defendants in State Court, have Federal Plaintiffs petition to intervene in the State Court proceedings, pursuant to applicable Pennsylvania rules of civil procedure or raise any of the requests



for relief which Petitioners raised in their Federal suit filed on November 6, 1987.

As a matter of fact, on November 6, 1987, while the State Court parties were at a status conference scheduled by The Honorable Silvestri Silvestri, Respondent herein, to determine the procedure for collecting Musisko's and his class members' benefits in the concluding State Court action, Judge Silvestri informed all counsel that he had been served that morning with Petitioners' Federal Complaint and would be turning over the papers to the Pennsylvania Supreme Court Administrative Office for appropriate legal representation. Thereafter, Judge Silvestri issued a stay order on



November 10, 1987 (Ex. "K", App. 74a), and the State Court proceedings have not moved forward since that time.

On November 5, 1987, Petitioners filed their Federal suit requesting that the State Court action be permanently enjoined from any further proceedings and that a declaratory judgment issue rendering the Pennsylvania Superior Court decision..."null and void pursuant to the Supremacy Clause of the United States Constitution;" (App. 26a).

On November 17, 1987, Respondent Musisko and his Class filed a MOTION TO DISMISS COMPLAINT pursuant to Federal Rule 12(b) raising the following defenses pursuant thereto; Petitioners' lack of standing; waiver;



laches; unclean hands; equitable estoppel; res judicata; collateral estoppel; comity and federalism; lack of timely removal; all timely briefed (App. 29a).

Thereafter, all parties filed respective Motions For Summary Judgments (App. 85a, 91a, 95a) with accompanying briefs and the United States District Court assigned the case to a United States Magistrate who, after oral argument, issued a REPORT AND RECOMMENDATION on September 7, 1988, denying Petitioners' Motion For Summary Judgment and granting the Motions For Summary Judgment of Respondents Musisko and Class and The Honorable Silvestri Silvestri, based upon the factual predicate of the case as set forth above and on the basis of the doctrine of abstention (App. 150a).



Following Petitioners' objections to MAGISTRATE'S REPORT AND RECOMMENDATION, the United States District Court did not adopt same, refused to grant Respondents' Motions To Dismiss Petitioners' Complaint or Respondents' respective Motions for Summary Judgment and on February 7, 1989, entered an Order enjoining Glenn Musisko and his Class and The Honorable Silvestri Silvestri, Respondents herein, ..."from proceeding on the matter filed at 7797 of 1982, in the Court of Common Pleas of Allegheny County, Pennsylvania, under any law other than ERISA." (App. 156a).

Thereafter, an appeal was taken to the UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT which reversed the District Court and remanded the case with



instructions..."that judgment be entered for defendants Musisko, the class, and the state trial judge." (Petitioners' Appendix A, 21a)

Although Respondents Musisko and Class adopt the sound reasoning of the Opinion of the UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, in toto, holding that the Anti-Injunction Act barred the District Court's order enjoining the State Court action for the reasons set forth therein, Respondents assert the following additional reasons why this case should not be reviewed by this Court.

Although, as set forth in the Opinion of the Court below, there were nine other defenses raised by Respondents Musisko and Class, to Petitioners' prayer



for declaratory and injunctive relief, based upon the factual predicate of the case at bar set forth above, the Court found it necessary to discuss only one as dispositive of Respondents' appeal, the Anti-Injunction Act, U.S. Steel v. Musisko, Nos. 89-3161 and 89-3162, slip op. p.6, f.n. 2 (3d Cir. Sept. 21, 1989).

However, these defenses, many of which rest on an adequate non-federal basis, could properly have served as the reason for reversal of the District Court's order and the Opinion of the UNITED STATES COURT OF APPEALS instructing that ... "judgment be entered for defendants Musisko, the class, and the state trial judge."

As noted in footnote five of the Court of Appeals Opinion, U.S. Steel



v. Musisko, Nos. 89-3161 and 89-3162, slip op. 21 (3d. Cir. Sept. 21, 1989), the abstention doctrine (found by the United States Magistrate as controlling) could well have served as the basis for reversal of the Order of the District Court (see U.S. Steel Id. slip op. f.n. 5, p. 21, and MAGISTRATES REPORT AND RECOMMENDATION App. 150a).

As a result of the lower Court's holding that the Anti-Injunction Act's bar was dispositive, the Court merely mentioned in passing the possible applicability of the Rooker-Feldman doctrine, where federal claims are "inextricably intertwined" with the merits of a judgment rendered by a State Court and the District Court is in essence being called upon to review



the State Court decision. (see U.S. Steel Id. slip op. f.n. 5, p. 21 and Rooker v. Fidelity Trust Co. 263 U.S. 413 (1923)). In the case at bar, the Pennsylvania Superior Court directed... "entry of judgment in favor of appellant, Glen J. Musisko", Musisko v. Equitable Life, supra, at p. 31, on the issue of the merits, the Pennsylvania Supreme Court denied allocatur and thus the Pennsylvania Superior Court judgment was the law of the State Court proceeding. As set forth in the COUNTERSTATEMENT OF THE CASE, Petitioners' Complaint sought to have the Superior Court decision declared null and void (App. 26a). "This the district court may not do." District of Columbia



Court of Appeals v. Feldman, 460 U.S.
462, 483-84 n. 16 (1983).

Thus, based upon the factual predicate of the case set forth above, the Opinion of the United States Court of Appeals for the Third Circuit could have been rendered on the basis of Petitioners' lack of standing; waiver; laches; unclean hands; equitable estoppel; res judicata; collateral estoppel; comity and federalism, or lack of timely removal and still had the same effect upon the order of the District Court which was reversed (see U.S. Steel, *supra*, slip op. p. 6, f.n. 2, 1989).

The UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT found as a matter of the factual record that

Equitable (State Court Defendant), the insurer representing Petitioners throughout the State Court proceedings, was in privity with Federal Plaintiffs (Petitioner), that Federal Plaintiffs were not strangers to the state court litigation, as all of the Affidavits of record disclose (see Affidavits of Joseph Jenkins, App. 128a and 132a and section 8 of Agreement between Equitable and U.S. Steel App. 104a) and therefore would be bound by the final judgment of the Pennsylvania Superior Court, the highest State Appellate Court which considered the case on its merits.

The policy between Equitable and Petitioners provides that Equitable ... "shall have the right to determine the amount of benefits, if any, payable



to an employee from the Policyholder's funds and the Policyholder agrees to accept and follow such determination." In the event of legal action by an employee for benefits under the Plan, Equitable..."shall undertake on behalf of the Policyholder or the Employer the defense of such action and shall pay any judgment rendered therein." The policy also permits Equitable to "...settle any such action when it deems it expedient to do so." (App. 104a) Thus, Plaintiff-Petitioners have delegated to their insurer the right to do everything Equitable did in State Court and what Equitable did in State Court was eventually to bind Petitioners to the judgment of the highest State Appellate Court which



considered the case on its merits.

In effect, Plaintiff-Petitioners are asking for a review of the underlying cause of action and final decision on the merits rendered by the Pennsylvania Superior Court, under what Respondents respectfully suggest, is the misguided assumption that ERISA and federal case law permits same to be done. Neither Pilot Life Insurance Company v. Dedeaux, 481 U.S. 41 (1987), nor Metropolitan Life Insurance Co. v. Taylor, 481 U.S. 58 (1987), sanction this result.

In Pilot Life, Id., Plaintiff filed a diversity action against Defendant, Pilot Life Ins. Co., for tortious breach of contract, breach of fiduciary duties, fraud in the inducement, general damages for mental and



emotional distress and punitive and exemplary damages, none of which causes of action were available to him under ERISA. This Court concluded that, "ERISA's civil enforcement remedies were intended to be exclusive." Pilot Life, Id. at 1557. This Court then quoted the conference report of ERISA describing the civil enforcement provision of Section 502(a) which stated:

"[W]ith respect to suits to enforce benefit rights under the plan or to recover benefits under the plan which do not involve application of the title 1 provisions, they may be brought not only in U. S. District Courts, but also in state courts of competent jurisdiction..."

Thus, Respondents submit that ERISA does not preclude State Court actions as long as the remedies sought are not something that is otherwise prevented by ERISA's civil enforcement



remedies. (ERISA provides,

"State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section." ERISA §502(e)(1), 29 U.S.C. §1132(e)(1).

Section 502(a)(1)(B) provides:

"A civil action may be brought --
(1) by a participant or beneficiary -- (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan."
29 U.S.C. §1132(a)(1)(B)

In the State Court action, Musisko and his class merely sued for money benefits determined by a set formula as set forth on page 15 of the PIB (Ex. "T", App. 121a). The remedy sought in the State Court action is exactly the same remedy which would have been provided had the suit been brought initially and/or properly removed to Federal Court, under ERISA



§502(a)(1)(B), 29 U.S.C. §1132(a)(1)(B). Respondents' claim did not attempt to supplement or supplant the remedies otherwise provided by ERISA's civil enforcement provision, which served as the basis for the Pilot Life decision, Pilot Life, Id., 481 U.S. at 50.

In Metropolitan Life Insurance Company v. Taylor, 481 U.S. 58 (1987), Plaintiff sued for mental anguish, wrongful termination of his employment, wrongful failure to promote and reim-
plementation of all benefits and insurance coverages. Once again, the remedies sought were pursuant to State law, which were not provided for under ERISA civil enforcement provisions. This Court held that the case was properly removable to Federal Court under 28 U.S.C. §1441(b). The record did not



support the contention that the Defendants in that suit waited five years before attempting to remove to Federal Court in violation of 28 U.S.C. §1446(b), requiring removal within a thirty (30) day period following receipt of the initial pleading.

Respondents Musisko and Class dispute Petitioners' argument that because Respondents' claim was brought in State Court, this would be the same as bringing their claims under state insurance contract law. The remedies were consistent with Section 502(a)(1)(B), 29 U.S.C. §1132(a)(1)(B) which provides:

"A civil action may be brought --
(1) by a participant or beneficiary -- (B) to recover benefits due him under the terms of his plan..."

The remedy which Respondents sought would have been the same whether their action was brought in State Court or Federal Court and that is simply for money damages afforded to them under the policy in question. The dispute between Respondents Musisko and Class, and Equitable, over the interpretation of the set-off provision of Section 9.37 at issue, was resolved in favor of Respondents by the State Appellate Court, which concluded that the clause in dispute was..."susceptible to another reasonable interpretation." and directed..."entry of judgment in favor of appellant, Glen J. Musisko." Musisko, Id. at 31.

Respondents submit that neither Pilot Life, Id. nor Metro-



politan Life, Id., stand for the proposition that any suit brought in a State Court necessarily means that the suit is brought pursuant to "state law" and therefore can never survive an ERISA challenge, even if timely.

What in truth has happened in the case at bar, is that Petitioners have sat back and watched their insurer defend the merits of the State Court action to the highest Appellate level and then when the State Court action was at its concluding stage, over five years later, proceeded to Federal Court to attempt reversal of the judgment on the merits rendered in the case against their insurer and to have the Pennsylvania Superior Court decision declared null and void on the misguided assumption that ERISA sanctions this

procedure to in effect, nullify five years of prior State judicial proceedings on the same underlying cause of action.

The reason for Petitioners' concern at the concluding stages of the State Court proceedings was due to paragraph 8 of the Equitable policy with Petitioners which provides,...

"The policyholder shall reimburse the Society for the portion of any such judgment or settlement paid from the Society's funds which represents an amount of benefits payable from the Policyholder's funds." (App. 104a)

What in reality has happened in the instant proceedings, is that Respondent and his Class have been caught in a dispute between Equitable and Petitioners as to who would be



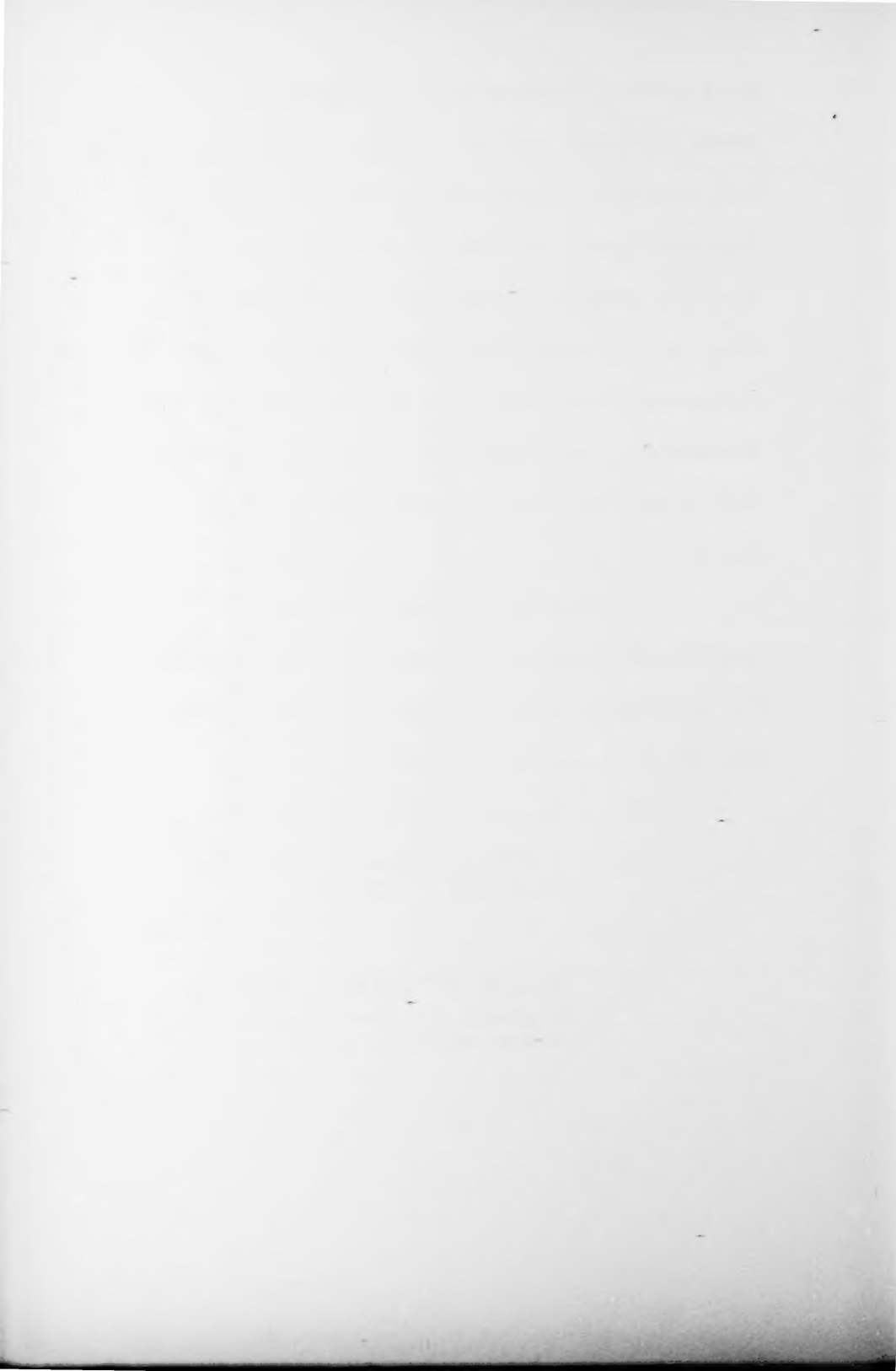
ultimately responsible for payment to them (see Ex. "N" p. 3 App. 104a). Respondents respectfully submit that the Supreme Court of the United States is not the proper forum for an advisory opinion between Petitioners and their insurance company over who may be ultimately responsible for payments due and owing to Respondents Musisko and Class.

WHEREFORE, for the above mentioned reasons, Respondents respectfully submit that Plaintiffs' Petition for Writ of Certiorari be denied.

Respectfully submitted,

ZOFFER, DILLMAN, WEDNER,
FRIEDMAN & FRAYER

Joseph M. Zoffer, Esquire
Counsel for Respondents
Glenn Musisko and Class



CERTIFICATE OF SERVICE

I, Joseph M. Zoffer, hereby
certify that three true and correct
copies of the foregoing BRIEF IN
OPPOSITION TO THE PETITION FOR WRIT
OF CERTIOTATI for Respondents Musisko
and Class were served this 8th day
of January, 1990, to the following
Counsel of Record, in the following
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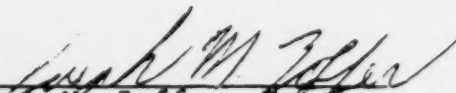


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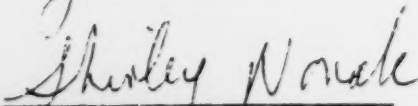


Joseph M. Zoffer, Esquire
Counsel for Respondents
Glenn Musisko and Class

Sworn to and subscribed

before me this 2nd day

of Jan, 1990



Shirley Novak

